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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1949

No. 572

IRVIN WINKLER, STANLEY ASKIN, HAROLD BUCHMAN, LEONARD COLLIDGE, WARREN L. VESTAL, REGINA SILVERBERG and CHARLES M. SWANN,
Petitioners,

vs.

STATE OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT OF PETITION

I. DUKE AVNET,
EDGAR PAUL BOYKO,
HAROLD BUCHMAN,
MITCHELL A. DUBOW,
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The Daily Record Co., Baltimore 3, Md.

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IRVIN WINKLER, STANLEY ASKIN, HAROLD BUCHMAN, LEONARD COLLIDGE, WARREN L. VESTAL, REGINA SILVERBERG and CHARLES M. SWANN,
Petitioners,

vs.

STATE OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioners, Irvin Winkler, Stanley Askin, Harold Buchman, Leonard Collidge, Warren L. Vestal, Regina Silverberg and Charles M. Swann, respectfully petition this Honorable Court for a Writ of Certiorari to the Court of Appeals of Maryland.

STATEMENT OF THE MATTER INVOLVED

This case presents the important question whether white and Negro citizens who wish to and who voluntarily engage in sports activity together in the public parks may be forcibly prevented from doing so by governmental officials solely because of the color of the skin of the sport participants.

Another question which is presented, but as serious in character, is whether persons may assemble and protest against such acts by governmental officials restricting voluntary association, and whether they may invite the public by circulars and word of mouth to join with them in this protest.

This case, now popularly known as "The Tennis Court Case", has assumed national and even international significance and has brought into sharp focus the challenge to our courts whether voluntary interracial sports activity by the Negro and white races can be interdicted, in our time, in consonance with our constitutional guarantees of freedom.

The State of Maryland, in a disingenuous attempt to evade the real issue, employed the ancient weapon of criminal conspiracy to secure a conviction against the white petitioners who dared to play tennis with Negro citizens on public tennis courts in Baltimore City. By this action, described in his dissent by Associate Judge Charles Markell, of the Court of Appeals of Maryland, as "a sham, belatedly devised to obtain and cover a conviction for exercising constitutional rights", the State made criminal the exercise of the constitutional rights of freedom of assembly, and of speech and press.

The petitioners were originally convicted of conspiracy to disturb the peace and for riot in connection with an interracial tennis tournament staged in Druid Hill Park, a public park in Baltimore City, on July 11, 1948.

The Young Progressives of Maryland, an interracial organization, had attempted to secure permission from the Park Board of Baltimore, the agency supervising the public parks, to use courts for interracial matches, but permission was denied. The refusal was not based, admittedly, on

any statute, ordinance, or rule of the Board, but solely on a notation in the minutes of one of the meetings of the Park Board forbidding interracial sports activity. This minute, was never introduced in evidence at the trial.

The Young Progressives, in conjunction with the Baltimore Tennis Club, a Negro organization, determined to proceed with their plan to conduct the tennis tournament, after securing legal advice. Leaflets were distributed advertising the tournament and inviting the public to attend; the press was notified, and plans were made to test the Park Board "policy" by submitting to arrest peaceably if ordered to desist from play. Permits to play on the courts were duly obtained and play began in an orderly manner until, following refusal to quit the courts upon order of the park police, the city police were summoned and some 22 persons were arrested for violation of park rules.

Approximately 150 persons witnessed the matches and arrests. No disorders occurred beyond verbal protests made by some spectators. No resistance to the arrests was made. One participant, who claimed that he would not leave the courts until placed under arrest, was carried off bodily. Five of those subsequently indicted had been spectators at the matches.

Six of the petitioners were originally indicted for violation of the park rules which merely required obedience to an order of the park police on pain of a small fine. However, two months later, when conviction on these grounds appeared dubious because of the vagueness and questionable legality of the Park Board's "policy", new indictments were returned, adding Harold Buchman, an attorney, as a defendant and accusing the seven petitioners of conspiracy to disturb the peace, riot and numerous other charges.

The trial revealed rather fantastic embellishments of the actual occurrences but still did not alter the substantial facts recited, or furnish any evidence of riot, disorderly conduct or disturbance of the peace. The petitioners were convicted of riot and conspiracy to disturb the peace.

In decision and sentences, the Court, sitting as a jury, expressed his sentiments in unvarnished political bias and intemperate remarks, to the extent of accusing petitioners of misleading the Negro participants. The sentences imposed on petitioners ranged from three to eighteen months in the House of Correction, with fines up to fifty dollars. The sentences were suspended, but the petitioners were placed under maximum probation of two years.

Subsequently, on motion for a new trial, a new trial was granted by the Supreme Bench of Baltimore City on the riot conviction, but the lower court was affirmed by a divided Supreme Bench in its conviction for conspiracy to disturb the peace. None of the petitioners, all of whom are white, was convicted of actually disturbing the peace or of disorderly conduct.

There was uncontradicted testimony that interracial activity in many different sports in public facilities in Baltimore City, under the supervision and control of the same Park Board, is frequent and accepted. It was further uncontradicted that interracial sports activity in the city generally, in both the amateur and professional fields, is the accepted pattern and rule. It was stipulated by the State and the Defendants that of ten public parks distributed in different geographical locations in Baltimore City having tennis courts, the Park Board has reserved nine for whites and only one for colored persons — the latter being located in Druid Hill Park. It was further stipulated that the Park Board has reserved 108 courts

for whites and only eight for colored persons. In proportion to population this means that less than 7% of the courts were reserved for colored persons as compared with those reserved for whites. The colored population in Baltimore City is roughly 20% of the total.

The Maryland Court of Appeals, the highest appellate tribunal in Maryland, affirmed the lower court on the ground that under its precedents it was powerless to review the facts and law in a criminal case. Judge Charles Markell, an associate judge, delivered a vigorous dissent, declaring that the petitioners were guilty of no offense and were convicted of exercising their constitutional rights.

THIS COURT HAS JURISDICTION

This Court has jurisdiction under the Judicial Code (U. S. Code, Annotated, Title 28, Sec. 1257 (3)). The Court of Appeals of Maryland decided this case on November 17, 1949, and stayed its mandate to February 1, 1950, pending filing of petition for writ of certiorari, or until completion by the Supreme Court of consideration of this cause.

THE QUESTIONS PRESENTED

I. Were the constitutional rights of the petitioners under the First and Fourteenth Amendments to the Federal Constitution abridged by their arrest and conviction on the charge of criminal conspiracy to disturb the peace:

A. because of their act in playing interracial tennis on a public park tennis court in the City of Baltimore, in the face of an alleged ban by officials of the City of Baltimore against such interracial activity, and

B. because of their acts in assembling to protest the alleged ban and in inviting the public by circulars and word of mouth to assemble for this purpose?

II. Did the Court of Appeals of Maryland err in its refusal to determine if the constitutional rights asserted by the petitioners had been violated, and in its refusal to examine the facts and law to make such a determination?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The Fourteenth Amendment guarantees to the citizens of the states the right to assemble, in its due process clause. The Fourteenth Amendment has been held by this Court to incorporate in its due process clause the guarantees of the First Amendment. *Schneider v. State*, 308 U. S. 147, 160. *DeJonge v. Oregon*, 299 U. S. 353. The right of freedom of assembly is cognate to other freedoms embraced in the First Amendment. This Court has been zealous to protect the rights of citizens of the states to use the public parks where same were forbidden to them by city authorities because of alleged undesirable political and social views. *Hague v. C. I. O.*, 101 F. 2d 774, modified on other grounds, 307 U. S. 496. See also *Sellers v. Johnson*, 163 F. 2d 877. In the present case, the Petitioners were exercising an act of assembly in Druid Hill Park in Baltimore City. The act of meeting at the park to protest against the alleged ban of the city officials against the interracial tennis tournament, was an act of assembly, and the act of playing the sport together on the tennis courts was also an act of assembly. The fact that it was recreational does not make it any the less an assemblage within the meaning of the First Amendment. Any other construction would narrow and emasculate the meaning of freedom of assembly in the Bill of Rights. The

act by the city officials of preventing this tennis tournament because of the mixed racial character of the group was strikingly analogous to the act of the city officials in the case of *Hague v. C. I. O., supra,* where it was sought to prevent the assemblage because of the disapproval of the political and social views of the individuals involved. The tennis tournament and the presence of the spectators was a voluntary peaceable assemblage and not one to commit a crime.

This case differs radically from the factual situations presented to this Court in the usual so-called segregation cases. In the latter group there is presented the factual scene of Negroes demanding equal facilities within the framework of the separate but equal doctrine of *Plessy v. Ferguson,* 163 U. S. 537. In "The Tennis Court Case" we have an entirely different case history and that is, white and Negro citizens demanding the right to voluntarily associate together in sports activity on public facilities. In the so-called segregation cases, above referred to, the right of voluntary freedom of association by members of both races is not presented; in this case it is. This poses, therefore, a new constitutional question in the application of the First Amendment freedoms in the field of race relations. That is why the case at bar has attracted widespread national and international attention. The implications of the questions involved far transcend the confines of this immediate petition. In an age where caste and race as a basis for imposing inferior status are recognized as relics of a barbaric and fading past, where internal and international demands make continuation of discrimination intolerable, the State of Maryland insists that members of the Negro and white races can use public recreational facilities voluntarily together only on pain of conviction as criminal conspirators.

And this is true even if there is no visible ban on such joint use. For it was admitted by the State that there exists no statute, no ordinance nor even a rule in a printed rule book of the Park Board of Baltimore which creates such a barrier. Nor was there even shown a consistent unwritten "policy" of segregation in sports in Druid Hill Park or in Baltimore City itself. Only loose reference to a notation in the minutes of one of the meetings of the Board was given as the basis for discrimination. But the notation was not even submitted in evidence! This Court has already held that a statute affecting civil liberties must be even more definite in its meaning than other types of laws. *Winters v. N. Y.*, 333 U. S. 507; *Stromberg v. Calif.*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242. Certainly, this stringent standard has not been complied with by the Park Board of Baltimore City. The prosecution for the use of the tennis courts by the Petitioners, therefore, was based on the arbitrary, ad hoc, determination of bureaucratic officialdom, whose caprice and racial bigotry have become the foundation for criminal prosecution. It is not surprising, therefore, that the State seized upon the sweeping charge of conspiracy to rescue itself from a dilemma.

There can be no question, furthermore, that the tennis facilities for Negro persons are unequal to those available for white citizens. There is a serious deficiency in the number of tennis courts set aside for members of the colored race in Baltimore City, and no consideration was given to geographical convenience. It cannot be argued therefore that the tennis court facilities provided for the Negro race, although separate, were equal, and thus there could have been no possible legal justification for separation of the races on these facilities. See *Plessy v. Ferguson*, 163 U. S. 537. The arrests and convictions made in pursuance of this

invalid "rule" must therefore fall. See *Morgan v. Virginia*, 328 U. S. 373, 376; *Thomas v. Collins*, 323 U. S. 516.

Petitioners further contend that even if the Court were to hold that the facilities provided were equal, segregation in the field of sports in public facilities is unconstitutional. *Lopez v. Seccombe, Mayor of the City of San Bernardino, et al.*, 71 F. S. 769. Recent and past decisions of the U. S. Supreme Court have dealt the institution of segregation very severe blows, and the present currents of our jurisprudence make its continuation legally untenable. *Buchanan v. Warley*, 245 U. S. 60; *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151; *Mitchell v. U. S.*, 313 U. S. 80; *Shelley v. Kraemer*, 334 U. S. 1. If the Constitution stays the hand of the state when it seeks to enforce *private* restrictive covenants, can the state enforce *public* acts which offend the Fourteenth Amendment? The State should not be permitted to employ the courts to enforce its own restrictive covenants. See Brief of Department of Justice in *Henderson v. U. S.*, No. 25, October Term 1949, Supreme Court of the United States.

Segregation is a cancer which has eaten at the fiber of economic and political democracy in America. It has made a mockery of professions of morality and religious brotherhood; warped minds and bodies have been the price paid for this barbarism. The world has derided our pretensions as defenders of democracy pointing with scorn at our institution of segregation. What can our answer be when one of the 48 states can arrest and convict young boys and girls, on the sole ground of differing pigmentation, for the high crime of playing tennis together on public courts?

If this be shocking, what must be said of the dangerous doctrine that Americans, exercising their constitutional rights of assembly, and of press and speech, in protest

against grievances, may be branded as criminal conspirators to disturb the peace? And this when there is neither evidence of nor conviction for actually disturbing the peace or acting disorderly. These constitutional rights become mere sham, to be exercised only if not offensive to the constituted authorities. As stated by Judge Markell of the Court of Appeals of Maryland, in his dissent:

> "A right that cannot be exercised is not a right. A constitutional right that can be exercised, by unpopular persons in an unpopular cause, not at all or only in silence and in silence and in solitude, is a mockery of the Constitution and of free government."

Nor can it be validly argued that inviting arrest to test the legality of a questionable "policy" constitutes the crime of criminal conspiracy to disturb the peace. The traditional way to test a disputed right is to exercise it. *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Douglas v. Jeannette*, 319 U. S. 157; *Thomas v. Collins*, 322 U. S. 516.

Petitioners and others assembled at the tennis court to conduct a tennis tournament as an act of protest against a grievance, the "policy" of the Park Board. Circulars were distributed, the press notified and play attempted — all in the clear light of day. Certainly, this could not be even remotely considered as a criminal conspiracy. Contrast this "criminal" conduct with the decision of this Court in *Terminiello v. City of Chicago*, 69 S. Ct. 894, and the brazen violation of the constitutional rights of the petitioners is apparent. But not only the petitioners have suffered. The affirmance by the Court of Appeals of Maryland is grim warning to the citizens of Maryland to refrain from peaceable exercise of their constitutional rights of assembly, press and speech. A protest meeting for higher unemployment benefits, for public housing, against discrimination, or on any

controversial issue, can become transformed into a conspiracy to disturb the peace.

The Court of Appeals of Maryland refused to determine if the constitutional rights asserted by the petitioners had been violated, and refused to examine the facts and law to make such determination. Its reason was that it was powerless to do so because the Maryland Constitution made the trial court the final judge of the law and facts in criminal cases. The settled law of the U. S. Supreme Court is clear that where it is asserted that a person has been deprived by a court of a fundamental right secured by the Constitution, an independent examination of the facts by this court is required to be made.

Norris v. Alabama, 294 U. S. 587;
Pierre v. Louisiana, 306 U. S. 354, 358;
Chambers v. Florida, 309 U. S. 227, 228, 229;
Lisenba v. California, 314 U. S. 219, 237, 238.

The high court of Maryland mistakenly subordinated the Federal Constitution to the Maryland Constitution and its own precedents. It was in duty bound to examine the record and to decide whether the petitioners' constitutional rights had been violated by the trial court which had convicted them for voluntarily assembling to play interracial tennis and for meeting to protest their grievance against the alleged ban on interracial sports activity in the public parks.

The veil of judicial legerdemain below must not be allowed to obscure the shameful wrong done the petitioners. We urge the Court to declare that Negro and white citizens can join together in wholesome recreational activity on public facilities without molestation. We urge this Honorable Court to reaffirm the inalienable rights of assembly, of press and of speech. The immediate grievances in

this cause are the petitioners'. The words of this Honorable Court on the questions raised in this petition can hearten all who believe in democracy.

Respectfully submitted,

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STATE OF MARYLAND,
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BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI

THE OPINION BELOW

The majority opinion of the Court of Appeals of Maryland and the dissenting opinion of Associate Judge Charles Markell is reported in 69 A. 2d 674.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257(3) Title 28, U. S. C. A. The Court of Appeals of Maryland has decided a case

> "where * * * title, right, privilege, or immunity is specially set up or claimed * * * under the Constitution * * * of the United States * * *"

Judgment was entered in this case by the Court of Appeals of Maryland on November 17, 1949.

STATEMENT OF THE CASE

On July 11, 1948, a number of persons were arrested at Druid Hill Park in Baltimore City because they refused to stop play, on order of the Park Police, in an interracial tennis tournament then in progress on the tennis courts of the park. The proper permits had been obtained previously as required by the Park Administration for the use of these courts (App. p. 79).

Previously, an organization interracial in its constituency, the Young Progressives of Maryland, had notified the Bureau of Parks that it desired to have an interracial tennis tournament in the park (App. p. 43). The Superintendent of Parks replied that this request could not be granted because the Park Board had a "policy" of segregation (App. p. 45). The only official evidence of such a policy was a loose reference to a minute of one of the meetings of the Park Board; the record of the minute was never offered in evidence (App. pp. 46, 51, 54). There was no rule or regulation or ordinance or law decreeing segregation in the public parks in Baltimore City. Later a group of citizens met with the Superintendent of Parks, on July 8, 1948, and again made the request which was turned down for the same reason (App. pp. 46, 47). The group then told the Superintendent that because they felt that they had the legal and constitutional right to engage in interracial sports activities in the public parks, they planned to go ahead with the tournament on July 11, 1948 (App. pp. 46, 47).

The organization of Young Progressives then made arrangements for a tournament with the Baltimore Tennis Club, a private local sports organization made up of members of the Negro race (App. p. 110). They advertised the tournament in the form of leaflets (App. pp. 91, 92). Their purpose was to test the legality of the aforementioned segregation policy of the Park Board and to bring this

policy to the attention of the general public so as to win its favor and support (App pp. 95, 96). They planned to play the tournament in a peaceful and orderly manner, and to continue to play until such time as they should be actually placed under arrest, if an arrest were to occur, in order effectively to test the policy's legality (App. pp. 79, 80). Their intention was to submit peaceably to such arrest (App. pp. 80, 82, 112). They had sought and received legal advice in advance concerning this undertaking (App. pp. 87, 101).

On July 11, the players took the courts for which they had received permits from the proper officials of the park authority and played peaceably and without any incident for about 15 minutes (App. pp. 82, 113). At that time the Park Police arrived and requested the players to leave, citing the segregation policy expressed in the form of a letter from the Park Board to a third party (App. pp. 58, 82). The players refused to leave unless they were placed under arrest and so informed the Park Police officials (App. p. 82). The Park Police then left and conferred with the Superintendent of Parks who was waiting nearby and who instructed the Park Police to make the arrests (App. pp. 64, 65). About 15 minutes after the first visit, the police returned (App. p. 82). On this second trip, the Park Police had reinforced themselves with city policemen, as if by a prearranged plan (App. p. 58).

There were onlookers watching the tournament, who were separated from the players by a metal wire fence which surrounded all of the courts (App. p. 66). There were about 150 of these onlookers and they were orderly and were made up of men, women and children, including many Sunday picnickers (App. pp. 55, 56).

When the arrests were finally made, the players submitted peaceably thereto (App. pp. 66, 149). A few of the players were alleged to have sat down on the courts,

but the evidence disclosed that only one of the Defendants was actually charged with sitting down, namely Irvin Winkler (App. pp. 157). Mr. Winkler testified that he sat down because he was not told that he was under arrest but was merely ordered off the tennis court, and that he intended to stay until arrested in order to test the Board policy, and he so indicated to the arresting officer (App. p. 167). This was corroborated by James E. Roberts, a law student. After the players were arrested and when in the Northern Police Station, some were improperly threatened and abused by the police.

Five of the seven Defendants who were convicted, namely Leonard Collidge, Warren L. Vestal, Regina Silverberg, Charles M. Swann and Harold Buchman were spectators. The substance of the police testimony at the Northern Police Station, at the time of the arrests was that there were some protests from the spectators but no actual resistance or disorder.

Subsequently thereto, on July 14, 1948, Defendants were indicted by the Baltimore Grand Jury in two sets of indictments alleging violations of certain park rules, which required obedience to orders from the Park Police on pain of a small fine (App. pp. 3-12). It was not until two months later, in September, 1948, that the State procured a new set of indictments, charging riot, conspiracy and other offenses and joining, for the first time, the Defendant, Harold Buchman, a lawyer, who had acted as friend and legal counsel to the other Defendants.

At the time of the trial in the Criminal Court, the police officers testified on behalf of the State and embellished considerably upon their original testimony in the police station (App. p. 468). Even then, the embellishment of the story as told by the police took the form of alleged expletives, but no actual violence. In point of fact, at the

police court hearing, the Defendants were charged only with violating the Park Rules or policy affecting segregation. One charge of resisting arrest by the Defendant, Swann, was dismissed in the police station by the Police Magistrate. It was conceded by the police that no order was ever given to the crowd to disband (App. p. 71).

The only testimony of violence at the Criminal Court trial was that involving the Defendant, Swann, a spectator, but even he was charged with a mere threat, namely raising his fist when arrested by the police. However, the testimony is uncontradicted that the arm he raised had been operated on, four days before, for a vein tumor (App. pp. 158, 159). He testified he raised his hand to protect it because the police were hurting it when they arrested him (App. p. 158). Spectators Vestal and Collidge were accused of asking to be arrested when the others were placed under arrest (App. pp. 441-451, 453-457). The spectator, Mrs. Silverberg was accused of protesting vehemently, but verbally, against the arrests (App. pp. 141-142, 143). Harold Buchman, an attorney, was accused of advising the players not to leave the tennis courts when the police ordered them to. However, Captain Gaeng of the Park Police admitted that the players may have said they would leave when arrested (App. p. 67). The testimony of the Defendants denied any disorder or resistance or incitement of any kind. This was corroborated by numerous persons present, many of whom were mere observers and who are not Defendants (William A. Graham, a student; Dr. Roy Johnson, a dentist; Martha Coffee, a student; Reginald Willis, baggage trucker; Dr. J. E. T. Camper, physician).

A step by step picture account of the whole episode in the park was placed in evidence by the defense, the said pictures having been taken by an amateur photographer, William A. Graham, revealing the orderly character of the tennis players and the spectators.

The testimony was uncontradicted that interracial activity in many different sports in public facilities in Baltimore City is frequent and is accepted (App. pp. 47-50, 118-119, 171). It was stipulated to by the State and the Defendants that of ten public parks distributed in different geographical locations in Baltimore City having tennis courts, the Park Board has reserved nine for Whites and only one for Colored persons—the latter being located in Druid Hill Park (App. p. 177). It was further stipulated that the Park Board has reserved 108 courts for Whites and only 8 for Colored persons (App. p. 177). In proportion to population this means that less than 7% of the courts were reserved for colored persons as compared with those reserved for Whites. The Colored population in Baltimore City is roughly 20% of the total (App. p. 176).

The State, over the vigorous protest of the Defendants, proceeded first with the trial on the conspiracy indictment. It was charged by the Defendants, and not contradicted by the State, but ignored by the Court, that this was done in order for the State to avoid the issue of the legality of the Park Rules, the violation of which constituted the basis for the entire series of criminal prosecutions. As has been stated before, the trial court then acquitted all of the Defendant except 7 white persons who were found guilty of riot and conspiracy to disturb the peace. The State then stetted the other counts, over objection of counsel for the Defendants, who sought a ruling on the charge that certain park rules had been violated, involving the so-called segregation policies of the Park Board. On a motion for new trial before the Supreme Bench of Baltimore (nine Judges sitting), the motion for new trial on conviction for the offense of riot was granted. The motion was denied, however, with respect to the conviction for conspiracy to disturb the peace. Two of the Judges, Sherbow and Niles, dissenting, held that the Defendants were guilty of no

crime, and that there was no law, rule, or regulation against interracial athletic activity in the public parks, and that the defendants could properly test the validity of the vague segregation "policy" by an arrest. On appeal to the Maryland Court of Appeals, the highest appellate court in Maryland, consisting of six judges, the conviction was affirmed on the ground that its own precedents precluded examination of the facts and the law. One Judge, Charles Markell, wrote a vigorous dissent, holding that the Defendants were properly exercising their constitutional right of freedom of association in playing tennis together and were properly exercising their basic constitutional rights of freedom of speech, press and assembly to protest against the park board "policy" of segregation. In his dissent, Judge Markell, bitterly decried the practice of using judicial power to destroy the personal liberties of citizens.

ERRORS RELIED UPON

I. The Constitutional Rights of the Petitioners under the First and Fourteenth Amendments to the Federal Constitution were abridged by their Arrest and Conviction on the Charge of Criminal Conspiracy to Disturb the Peace:

   A. because of their act in playing interracial tennis on a public park tennis court in the City of Baltimore, in the face of an alleged ban by officials of the City of Baltimore against such interracial activity, and

   B. because of their acts in assembling to protest the alleged ban and in inviting the public by circulars and word of mouth to assemble for this purpose.

II. The Court of Appeals of Maryland erred in its Refusal to Determine if the Constitutional Rights Asserted by the Petitioners had been Violated, and in its Refusal to Examine the Facts and Law to Make such a Determination.

ARGUMENT

I.

The Constitutional Rights of the Petitioners under the First and Fourteenth Amendments to the Federal Constitution were abridged by their Arrest and Conviction on the Charge of Criminal Conspiracy to Disturb the Peace:

A. because of their act in playing interracial tennis on a public park tennis court in the City of Baltimore, in the face of an alleged ban by officials of the City of Baltimore against such interracial activity, and

B. because of their acts in assembling to protest the alleged ban and in inviting the public by circulars and word of mouth to assemble for this purpose.

It was undisputed that there was no law, ordinance, rule or regulation imposing segregation in the use of public sport facilities in the parks of Baltimore City. It was admitted by the State that there is no such rule or law pertaining to interracial tennis playing on the public tennis courts (App. 53).

It cannot be argued that there was a recognized or uniform practice of segregation in the use of public sports facilities in Baltimore City. The record is uncontradicted that professional football and baseball games have been and are regularly played on a non-segregated basis in the Stadium which is owned, controlled and supervised by the Park Board (App. pp. 47-50). In the very park where the incident occurred involved in this case, interracial activity in sports and recreation has been widespread. There has been use of so-called white tennis courts by Negro players in the presence of park police in Druid Hill Park (App. pp. 118, 119, 171). In sports generally in Baltimore City, there has been and is a general pattern of non-segregation in

sports participation, as for example in professional baseball and football (App. pp. 47-50). In the light of such facts, it cannot be contended that although there was lacking a specific law imposing segregation in the public parks, there was a practice to this effect. Nor can it be argued successfully that there was a policy to this effect. The Board thought so little of the validity of this "policy" that it did not print this "policy" in its most recent rule book, printed in 1948, which contained all of the rules of the Board (App. pp. 53, 54). The prosecution for the use of the tennis courts by the Defendants, therefore, was based on the arbitrary, ad hoc, determination of bureaucratic officialdom, whose caprice and racial bigotry have become the foundation for criminal prosecution.

Is citation of authority necessary to assert that prosecution for alleged violation of a non-existent criminal provision cannot be valid? A statute which is so vague that persons of ordinary intelligence must necessarily guess its meaning and differ as to its application has been held to violate constitutional guarantees of due process of law, Winters v. New York, 333 U. S. 507. What can be said of an amorphous "policy", authentication of which can only be made by reference to an obscure notation in the minute books of the Park Board, a policy which was not uniformly and consistently enforced, but was, on the contrary, more honored in the breach than in the observance. Furthermore, the exact nature and text of the "policy" was never made known in the record and is unknown in fact. Does the "policy" forbid any form of interracial sports? It was admitted that not all races are affected by this "policy" (App. p. 51). Nor are nationality groups included in the proscription (App. p. 52). Which races and under what circumstances does the ban apply? The "policy" does not say. Does the policy forbid persons of the white and Negro

races from voluntarily participating in sports on public facilities? Does the policy make an exception where the Baltimore stadium is concerned? What is the proscription of the Park Board and where is the line drawn? Again, what penalty, if any, is provided for breach of the "policy"? All of these questions belie the validity of the "policy".

Perhaps the best evidence of the ephemeral quality of the so-called "policy" was reflected in the unwillingness of the State to prosecute its alleged violation. Apparently convinced that conviction could not be obtained on the ground of violation of park rules banning interracial athletics, the State nevertheless determined to wreak its vengeance on citizens courageous and principled enough to assert that the Constitution extends its benevolence to all. The sweeping weapon employed since feudal times to oppress innocent citizens—conspiracy—was resurrected.

As stated by Judge Markell in his dissent below:

> "As to the appellants' constitutional right to play interracial tennis, the opinions of the judge at the trial and of the majority of the Supreme Bench on motion for new trial; apparently do not question—and the evidence does not warrant questioning—the statement and conclusion in the dissenting opinion of Judges Niles and Sherbow: "The basic fact is that there was no law, rule, or regulation of the Park Board prohibiting interracial tennis; there was only a minute in its records adopting a 'policy' of segregation. The defendants therefore in planning the tennis match did not conspire to commit an unlawful act, nor in playing tennis did they commit an unlawful act * * *." (*Winkler et al. v. State*, 69 A. 2d 674, 680.)

The record shows that of ten public parks distributed in different geographical locations in Baltimore City having tennis courts, the Board had reserved nine for whites and only one for colored persons. The Park Board had actually

reserved only 108 for whites and only eight for Negroes. In ratio to population, this meant that less than seven percent were reserved for members of the Negro race, whereas the Negro population in Baltimore City is about 20 percent of the total.

There can be no question, therefore, about the facilities being unequal for Negro persons as compared with those for whites. First of all, there is a serious deficiency in the number of tennis courts set aside for members of the colored race. Secondly, geographical convenience is utterly disregarded in providing tennis courts for Negroes in Baltimore City. The law is well established that facilities for the two races must be equal, if it is sought to impose segregation.

Therefore, because the "rule" did not comply with the basic constitutional requirements, it was void and of no effect. The arrests and convictions made in pursuance of a void rule must fall.

Morgan v. Virginia, 328 U. S. 373, 376;
Thomas v. Collins, 323 U. S. 516.

The exercise by a city agency of powers affecting constitutional liberties of citizens is subject to the same constitutional limitations as the exercise of powers by the state. *Hague v. C. I. O.,* 101 F. 2d 774, modf'd on other grounds 307 U. S. 496; See also *San Francisco Gas Co. v. San Francisco,* 189 F. 493; Ex parte Walrod, (Okla. 1941) 120 P. 2d 783.

It is the appellants' position also that even if the Court were to hold that the facilities provided were equal, that segregation in the field of sports in public facilities, the subject of this appeal, is unconstitutional. In the case of *Lopez v. Seccombe, Mayor of the City of San Bernardino, et al,* 71 F. S. 769, the United States District Court ruled

that where persons of Mexican descent were excluded from a public park, recreational grounds, swimming pool and bath house by the City officials of San Bernardino because of their race and ancestry, such exclusion was discriminating and constituted a violation of the equal protection clause of the 14th Amendment.

The mere making of such a rule by the Park Board, does not endow it with legal sanctity. The law is well settled that where constitutional rights are involved, a statute or ordinance does not bear a broad presumption of constitutionality. *U. S. v. Caroline Products Co.*, 304 U. S. 144; *Thornhill v. Alabama*, 310 U. S. 88, 95-96.

The record shows that the only persons whom the Park Board sought to single out in this case for segregated treatment were the Negro people (App. pp. 51-52). Integrated sports activity is entirely permissible, according to the Park Board, for other groups and segments of the population in Baltimore City. This is discriminatory treatment against the Negro people and therefore the policy is unconstitutional and void. If a law or rule discriminates unjustly between persons in similar circumstances material to their rights, such a denial of equal justice violates the "due process" and "equal protection" clauses of the Federal Constitution. All governmental classifications must be based upon a significant difference having reasonable relationship to the subject matter of the law else such discriminations are illegal.

Southern Railway Co. v. Greene, 216 U. S. 40, 417;

Gulf Colorado & Sante Fe Railway Co. v. Ellis, 165 U. S. 150, 155;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 560;

Atchison Topeka & Sante Fe Railway Co. v. Vosburg, 238 U. S. 56, 60, 61;

Royster Guano Co. v. Virginia, 253 U. S. 412, 416, 417;
Smith v. Cahoon, 283 U. S. 553, 556, 567;
Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 462, 463;
Colgate v. Harvey, 296 U. S. 404, 422, 423;
Mayflower Farms v. Ten Eyck, 297 U. S. 266, 274;
Skinner v. Oklahoma, 316 U. S. 535, 541, 542;
Louisville Gas & Electric Co. v. Cohen, 277 U. S. 32, 37;
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400;
Powers Mfg. Co. v. Saunders, 274 U. S. 490, 493;
Truax v. Corrigan, 257 U. S. 312, 337;
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 106, 107.

Recent and past decisions of the U. S. Supreme Court have dealt the institution of segregation very severe blows, and the present currents of our jurisprudence make its continuation legally untenable. Following the Civil War, the bloody victory won on the battlefields was translated into law in the form of the 13th, 14th and 15th Amendments which liberated the Negro. The 13th Amendment abolished slavery and involuntary servitude. The 14th Amendment created rights of national citizenship and sought to eradicate class distinctions and to create a democracy where all persons would be considered politically and legally equal regardless of race, color or previous condition of servitude. The 15th Amendment guaranteed the right to vote regardless of race, color or previous condition of servitude. The Committee hearings and the debates in Congress immediately preceding the adoption of these amendments indicate quite clearly that the purposes behind them were twofold: (1) to make the Bill of Rights applicable to the states; (2) to write into the Constitution the new Congressional theory of civil rights guaranteed by

national citizenship. There was no real question that the 14th Amendment was to apply to individuals as well as to state governments in the protection of civil rights. (See Hearings of the Joint Committee on Reconstruction of the 39th Congress and the debates in the 39th Congress on the Freedmen's Bureau Bill and the Civil Rights Bill. (House Report #30, 39th Cong. 1st Sess.; Senate Reports, Senate Docket 711, 63rd. Cong. 3rd Sess.; 36 Cong. Globe 1090 et seq.; 44 Cong. Globe App. 84 et seq.).

However, there was a retreat from the principles by the Supreme Court. (See: *Slaughterhouse Case,* 16 Wall. 36, 21 L. Ed. 394 (1873), in which the privileges and immunities guaranteed to citizens in the 14th Amendment were stripped of their promise to the people of basic civil rights; *U. S. v. Cruikshank,* 92 U. S. 542 (1875), where the equal protection clause of the 14th Amendment was made into a hollow shell by denying relief to Negroes who were intimidated from conducting a peaceful meeting; *U. S. v. Harris,* 106 U. S. 629 (1883) in which the Ku Klux Act was rendered unconstitutional thereby freeing lynchers of a Negro; *Civil Rights Cases,* 109 U. S. 3 (1883) where the Civil Rights Act of 1875, which forbade individuals from denying the equal enjoyment by the white and Negro races of transportation convenience, amusements and accommodations, was held illegal.)

It was in this background in the 90's that the states in the South proceeded to enact "White Supremacy" laws inflicting on the Negro people the terrible scourges of segregation and disfranchisement. And it was in this dark era that the Supreme Court decided the case of *Plessy v. Ferguson,* 163 U. S. 537 (1896) which laid down the doctrine that segregation is legal providing equal facilities are provided for the two races.

The equalitarian character of the 14th Amendment was not entirely lost on the U. S. Supreme Court, and by an enlightened series of decisions the brightened legal corridor remains open down to today. In *Washington, Alexandria and Georgetown R. R. Co. v. Brown,* 17 Wall. 409, 453 (1873) the court outlawed the practice of separate cars for negro passengers on a railroad from Virginia to Washington, D. C., where the Congress had provided in its grant of a charter to the company that it should not exclude persons from its cars on account of color. In the cases of *Strauder v. W. Va.,* 100 U. S. 303; *Ex parte Va.,* 100 U. S. 339; *Virginia v. Rives,* 100 U. S. 330 and *Neal v. Delaware,* 103 U. S. 370, it struck down the practice of excluding Negroes from juries. In the *Neal* case, *supra,* the Court decried discriminations against the Negro people which would reduce them "to the condition of a subject race".

In 1917, the Court rendered the important decision in *Buchanan v. Worley,* 245 U. S. 60, in which it ruled unconstitutional an ordinance of the City of Louisville which forbade Negro occupancy of residential property in a predominantly white area and vice versa. The ordinance followed the pattern of attempting to place equal burdens on both white and Negro buyers of realty and was predicated on the desirability of the separation of the races. The ordinance was supported by the argument that it would prevent race riots but the Court answered saying that this was no legal justification for the violation of one's constitutional rights. The Court was unequivocal in stating that a State could not extend the use of its police power to the point where it would override the civil rights of its citizens, even where it claimed such use in the public interest.

In the case of *McCabe v. Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151 (1914), the Court pronounced a doctrine which was the forerunner of a revolt against the separate but

equal dogma of *Plessy v. Ferguson.* The Court rejected the old segregation shibboleth in a case involving the constitutionality of segregation in interstate transportation, to the extent that it held that the constitutional guarantees are not made to a particular racial group or to any class of persons but are made to *individual* persons. Under the proportional equality device it is quite conceivable that a Negro person may be unable to use pullman facilities set aside for his race, while there is still space available set apart for whites, due to the variations of demand. When that occurs, the Court held that the Negro person who is turned away is illegally discriminated against.

The Court reaffirmed this break-away position from *Plessy v. Ferguson* in the later case of *Mitchell v. U. S.*, 313 U. S. 80, in which it reiterated that Constitutional rights are *personal* and not racial. This case also involved an interstate carrier.

In 1938, the Court decided *Missouri ex rel. Gaines v. Canada,* 305 U. S. 337, and held that Missouri could not exclude Negroes from its law school where it had only one law school, and that the constitutional requirements of equal protection of the law were not satisfied when a Negro was compelled to rely upon out-of-state aid to get the education furnished for whites within the state. This case is also a severe blow at the *Plessy v. Ferguson* doctrine of "separate but equal" because it critically treated the suave pretension of equality and compels a result which makes it almost imperative that Negroes be admitted to schools of higher learning without segregation.

In the recent case of *Takahashi v. Fish & Game Commission,* 334 U. S. 410, the Court ruled that it was illegal for a state to discriminate against a person of the yellow race in engaging in a useful occupation. In the case of *Oyama*

v. California, 332 U. S. 633, 640, 646, the Court made the same ruling with respect to ownership of property.

The most recent cases in revolt against the separate but equal doctrine occurred in a series of cases involving restrictive covenants. These are:

Shelley v. Kraemer, 334 U. S. 1;
Hurd v. Hodge, 68 S. Ct. 847;
McGhee v. Sipes, 68 S. Ct. 836;
Uricolo v. Hodge, 68 S. Ct. 847.

The above cases hold that while it may be legal, technically speaking, for persons to agree to discriminate against members of another race in the alienation of realty through the device of restrictive covenants, the Constitution stays the hand of the state when it seeks to enforce such private agreements. In the *Shelley* case, *supra,* which involved covenants to exclude Negroes from the ownership or occupancy of real estate, the Court held that the constitutional rule of equality is *personal* and that the denial of such a right to whites under similar circumstances will not validate the discriminatory act against the Negro. Chief Justice Vinson, speaking for the Court, said:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

It can therefore be said that the U. S. Supreme Court has about completed an historical cycle in the interpretation and application of the Fourteenth Amendment with respect to state action enforcing segregation on fellow-Americans of the Negro race. The cycle commenced with the legitimation by the Court of the discriminatory practice by the states of segregation of Negro citizens and the negation of the equality philosophy of the Fourteenth Amendment. This was done, however, with the aid of the separate but equal

device which was at once impossible of achievement and a subterfuge for treating the Negro citizens as an inferior people. The basic motivation for this pernicious treatment of the Negro was economic because history has shown that the degrading of a people by a dominant group in society is done to exploit them. This was true with respect to the slavery of the Negro in the South before the Civil War, and segregation is one aspect of the status imposed upon the Negro after the Civil War by similar exploiting forces—this status is that of second class citizenship. The other end of the cycle is the attitude of true equality for the Negro citizen as the emancipation amendments intended. The Negro citizen should now be recognized by the Court as an American citizen with the same civil rights and dignity as any other American citizen. Segregation of the Negro cannot survive, therefore, so far as the law is concerned.

The Report of the President's Committee on Civil Rights (U. S. Government Printing Office, 1947) at page 166 reads as follows:

> "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together. There is no adequate defense of segregation."

It is significant that the Government, through its Solicitor General, has unequivocally adopted the position that segregation of the Negro people in any phase of American life is legally untenable and deleterious to the social and economic health of our nation. See Brief of the U. S.,

Henderson v. U. S., No. 25, October Term, 1949, Supreme Court of the United States.

In the case at bar there was involved the exercise of the right of freedom of asssembly by the defendants and the other persons who participated in the tournament or who congregated to watch the tournament. The U. S. Supreme Court has ruled that the guarantees of the Fourteenth Amendment incorporate the rights of the First Amendment, one of which is freedom of assembly. *Murdock v. Pa.*, 63 S. Ct. Rep. 870; *DeJonge v. Oregon*, 299 U. S. 353. The act of meeting together at public tennis courts to participate in a tennis tournament together is an act of assembly. The act of the spectators in convening to watch the tournament is an act of assembly. The very tournament in this case constituted an act of protest against a grievance, namely, the obnoxious "policy" of the Park Board forbidding persons to participate in sports together on public facilities because of the color of their skin. To effectuate the protest, circulars were distributed advertising the tournament and protesting against the aforesaid ban. There was involved then in this case the sacred and traditional American liberties, namely, the freedoms of speech, press and assembly. It is precisely because these fundamental and precious American concepts were invoked by the defendants and were vigorously and ruthlessly suppressed by a governmental agency, namely, the Park Board, that this case assumes an unusual importance, and merits the closest scrutiny to guarantee the protection of the defendants' rights. The act by the Park Board and the park police of preventing the continuation of the tennis tournament because of the mixed racial character of the participants was analogous to the acts of city officials in the case of *Hague v. C. I. O., supra,* to prevent the assembly of persons because of their political or social views. (See also *Sellers v.*

Johnson, 163 F. 2nd 877.) The disapproval of this type of assemblage by the Park Board could not legally justify the denial of the civil rights of the defendants in this case. The simple edict of the Park Board does not grace it with any special dispensation in the law, and an abuse of authority is still an abuse of authority and therefore constitutes a void act, whether the governmental agents acted in good faith or out of mistake. Thus the arrest and conviction of the defendants were nevertheless void. See *San Francisco Gas Co. v. San Francisco*, 189 F. 943.

The prosecution urged that the policy was justified in order to avert public disorder, which might ensue where the Negro and white races participate jointly in a sports program in public facilities. This point is treated at greater length later in this brief but suffice it to say that such an argument has been repeatedly rejected by the United States Supreme Court, where it is used as a justification for the suppression of civil rights.

> *Terminiello v. City of Chicago*, 69 S. Ct. Rep. 897;
> *Buchanan v. Worley*, 245 U. S. 60.

The normal way to test a disputed right is to exercise it. *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Douglas v. Jeannette*, 319 U. S. 157; *Thomas v. Collins*, 322 U. S. 516; *Morgan v. Va., supra.* There is no fixed limitation on the number of persons involved in order to have an orderly test of a law by inviting arrest. The suggestion in the majority opinion of the Supreme Bench of Baltimore City that the use of more than 2 players to make a test would mean a criminal intent is without support in the law. It is quite obvious that this statement was prompted by that Court's disapproval of the method of inviting arrest to test a law's validity. It suggested instead the use of a proceeding in equity, such as injunction. However, that court's

choice in this matter is not binding as law, and it is submitted that that court erred in its ruling. Certainly a large number of persons was involved in the cases of *Thomas v. Collins, supra,* and *Morgan v. Virginia, supra.* Finally, the ruling of the Court of Appeals contravenes the latest pronouncements of the U. S. Supreme Court in the case of *Terminiello v. City of Chicago, supra.* In this last named case, the high court ruled that no offense is made out where a person while exercising a civil right may tend to cause disorder. An opposite ruling would mean the end of the effective exercise of civil rights. This is discussed in further detail under the next point. However, as is often the case in civil right issues, the record shows that there was no disorder except that which was made by the police in making the arrests.

The Supreme Court of the United States has been zealous to guard the guarantees expressed in the Bill of Rights against assaults by State government, as well as by federal authorities. The latest expression of the Court appears in the case of *Terminiello v. City of Chicago, supra.* Mr. Justice Douglas said:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in DeJonge v. Oregon, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsible to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices

and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, pp. 571-2 is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious and substantive evil that rises far above public inconvenience, annoyance or unrest. See Bridges v. California, 314 U. S. 252, 262; Craig v. Harvey, 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts or dominant political or community groups."

In this case, the petitioner delivered an impassioned and bitterly provocative speech before a large audience which was sprinkled with hecklers, and when surrounded by picketers militantly milling about the hall where the meeting was being held, he was convicted under an ordinance which forbade persons from speaking under circumstances which would encourage disorders and invite disturbances of the peace. It was held that the proof in the case did not mount up to a clear and present danger of a substantive evil, under which circumstances basic liberties might be curtailed. The test of inherent or reasonable tendency to create disorders by the exercise of the civil right involved was rejected by the U. S. Supreme Court.

As stated by Judge Markell in his dissenting opinion in the Maryland Court of Appeals:

"The opinions of the majority of the Supreme Bench and of the trial judge show that appellants were convicted for exercising not only one constitutional right, to play interracial tennis, but several constitutional rights, viz., the right to play interracial tennis and also the right of freedom of speech and the press and the right of peaceable assembly, in distributing the circular and otherwise inviting attendance at the tennis tourna-

ment. In those opinions the burden of the condemnation of appellants was (a) distribution of the circular, (b) invitation of spectators, (c) exercise of the constitutional right by more than two players (one white, one colored), the minimum number, sufficient (if they were arrested) to furnish a basis for a judicial 'test' of the right, and (d) the exercise of the right at all without first establishing it by suit for injunction or mandamus—all after 'warning' that 'trouble might arise from the gathering if they attempted to play tennis'. Distribution of the circular was an exercise of the freedom of speech and the press and the right of peaceable assembly. The circular had no tendency to—much less showed any intention or created any 'clear and present danger' of—'defiance of law and order' or assembly to disturb the peace. It does not incite to, or suggest, resort to force or violence but only legal or political action to a legal and political end. The fact that the purpose of assembling was political as well as recreational only emphasizes the right of peaceable assembly and freedom of speech and the press. This was not the first time political action was ever taken on a tennis court—as was known before the First Amendment was ratified or proposed."

II.

The Court of Appeals of Maryland erred in its Refusal to Determine if the Constitutional rights asserted by the Petitioners had been Violated, and in its Refusal to Examine the Facts and Law to make such a Determination.

The Maryland Court of Appeals in its majority opinion avoided a decision on the constitutional issues involved in the case by asserting that it was powerless to examine into the facts and the law. It supported its position by citing its own precedents on this point. It is patently obvious that the Maryland Court of Appeals, in effect, sought to subordinate the Bill of Rights of the Federal Constitution to its own judicial proclamations. Its precedents in this con-

nection were in turn its interpretations of the Maryland Constitution (Article 15, Section 5), which endows the juries in Maryland in the trial of criminal cases with the power to pass on both the facts and the law involved. This legal syllogism would mean the subordination of the Federal Constitution and the Amendments thereto to the Maryland Constitution. This offends our basic structure of government and is in direct contravention to the settled law of this Court. The Federal Constitution and its Amendments are the supreme law of the land.

Article 6, Const. of the U. S.;
McCulloh v. Md., 4 Wheat 316, 426;
Cohen v. Virginia, 6 Wheat 264;
Martin v. Hunter, 1 Wheat 304;
Tennessee v. Davis, 100 U. S. 257;
Md. v. Soper, 270 U. S. 9.

As was set forth by Judge Markell in his dissent below:

> "So far as the Constitution of the United States is concerned, Maryland need not provide any appeal at all. But if and when it does provide an appeal the appellate court and judges, like all other Maryland courts and judges, are bound by the Constitution of the United States, 'anything in the Constitution or Laws of this State to the contrary notwithstanding'. Maryland cannot exempt them from this obligation."

In "The Tennis Court Case" rights and immunities under the Federal Constitution were asserted by the Petitioners, namely; that they were arrested for exercising the freedoms of assembly, speech and press. It was further asserted that the Park Board "policy" violated the equal protection and due process clauses of the Fourteenth Amendment. It was the constitutional duty of the Maryland high court to review the facts and the law and no State judicial precedent or State constitutional provision could avail the court to do otherwise. The U. S. Supreme Court has ruled that

where it is asserted that a person has been deprived by a court of a fundamental right secured by the Constitution an independent examination of the facts by this Court is required to be made.

Norris v. Alabama, 294 U. S. 587;
Pierre v. Louisiana, 306 U. S. 354, 358;
Chambers v. Florida, 309 U. S. 227, 228, 229;
Lisenba v. California, 314 U. S. 219, 237, 238.

In Lisenba v. California, supra, this Court stated that the performance of its duty to make that examination of evidence "cannot be foreclosed by the finding of a court, or the verdict of a jury, or both". It is submitted that the Maryland Court of Appeals erred in refusing to examine into the facts and the law in this case because here the Petitioners asserted that they were deprived of basic constitutional freedoms not only by the Park Board but also by the trial court in Maryland which convicted them for the exercise of these freedoms.

CONCLUSION

This case involves the right of persons to engage in tennis playing upon the public parks regardless of the color of their skin. Because certain persons attempted to do this in Baltimore City they were jailed.

The Maryland courts were used to brand these people as criminals. What these people did was in the best tradition of sportsmanship and constituted the finest expression of the democratic way. Our highest court should undo the grevious wrong inflicted on these deserving people. This is particularly fitting when we now as a signatory to the United Nations Charter have pledged ourselves to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex,

language, or religion * * *" (Chapter 1, Art. 1, Sec. 3 of U. N. Charter).

Should the convictions stand, the ghetto wall between white and black will rise higher, the perpetuators of discrimination in public recreational facilities will rejoice, the building of amity among the peoples of the United States will receive a severe setback. Freedom of speech, assembly and press in Maryland, and elsewhere, will be curtailed as instruments for progress. Reversal of the convictions will be, on the other hand, a ringing affirmation of American fundamentals—that men and women of different races can, if they so choose, join in sport together in their public parks and that they may utilize their constitutional rights in the pursuit of progress.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 572

IRVIN WINKLER, et al.,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 572

IRVIN WINKLER, et al.,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Court of Appeals of Maryland. The Petitioners (all members of the white race) were, at their own election, tried in the Criminal Court of Baltimore before the Court sitting as a jury, on the charge of conspiracy to disturb the public peace. This was the Fifth Count of the Indictment and is set forth at pages 10-11 of the Transcript of Record, references to which are hereafter designated "T". Prior to the trial on the merits, Petitioners, together with other defendants who were acquitted, filed a motion to quash the indictment and a demurrer to the indictment, which were overruled by the trial court.

Upon conclusion of the testimony, Judge Moser, sitting as a jury, found Petitioners guilty not only of the charge referred to above but also of the charge of riot. (First Count of the Indictment, T. pp. 7-8.) At the same time, the trial court acquitted fifteen of the defendants. Motions for a new trial and in arrest of judgment were filed. Hearing on these motions was held before the Supreme Bench of Baltimore City. These motions were granted on the riot count and overruled on the conspiracy count. Seven of the Judges of the Supreme Bench voted in favor of this action. Two of the Judges dissented, considering that the motions should have been granted as to both counts. The Trial Judge did not sit at the hearing on said motions.

Sentences were imposed upon Petitioners on March 22, 1949, as follows: Stanley Askin—one year in the House of Correction and $50.00 fine; Harold Buchman—eighteen months in the House of Correction and $50.00 fine; the remaining Appellants, Leonard Collidge, Irvin Winkler, Warren L. Vestal, Regina Silverberg and Charles M. Swann were sentenced to three months in the House of Correction and $10.00 fine. Sentences were suspended as to each of said Petitioners and probation was imposed for a period of two years.

QUESTIONS PRESENTED

Respondent respectfully submits that only one basic and controlling issue is presented by the Petition for Writ of Certiorari, viz.:

I.

Is Any Federal Constitutional Question Presented in This Case?

Respondent believes that, after consideration of the facts in this case and of the law applicable thereto, this Court

will determine that no Federal Constitutional question is involved; that, therefore, there is no basis for the issuance of the writ, as requested.

However, Petitioners, in their Brief, assert that two questions are presented which this Court can consider, viz.:

II.

Were Petitioners' Constitutional Rights Under the First and Fourteenth Amendments of the Constitution of the United States Abridged by Their Arrest and Conviction on the Charge of Conspiracy to Disturb the Peace?

III.

Did the Court of Appeals Err in Its Refusal to Examine the Evidence in the Case so as to Determine Whether the Constitutional Rights Asserted by Petitioners Had Been Abridged?

STATEMENT OF THE FACTS

The Young Progressives of Maryland (an organization of young people numbering amongst its members colored and white men and women of various religions and creeds) decided to test the policy of the Park Board of Baltimore City against inter-racial play on public park tennis courts (T., Askin, p. 77). Attention of the Court is directed to the fact that the action, hereinafter referred to, occurred during the Summer of 1948, the last Presidential election year, and shortly after the various nominating conventions, including that of the Progressive Party, headed by Mr. Henry Wallace, were held. Although the Young Progressives were not officially allied with the Progressive Party, according to Petitioner Buchman, said party did take official action in support of the test of the policy of the Park Board.

On July 3, 1948, the Young Progressives of Maryland by Stanley Askin, Director, made written request upon Mr. Harold S. Callowhill, Superintendent, Bureau of Recreation, that he notify the attendants of the tennis courts in Druid Hill Park that members of their organization should be permitted to use said courts on Sunday, July 11, 1948; that such permission should be granted regardless of the race, color or creed of the players. On July 6, 1948, this letter was forwarded by Mr. Callowhill to Mr. Charles A. Hook, Superintendent of Parks. On July 8, 1948, Mr. Hook wrote to Mr. Askin that "I regret that I cannot comply with your request because the Board of Recreation and Parks rules that there shall be segregation. * * *" (T. pp. 43-45).

Several days later, Mr. Askin telephoned Mr. Hook and requested an interview regarding this matter. Mr. Hook at first advised Mr. Askin that he saw no necessity for an interview. Finally, Mr. Hook told him to come on out. In addition to the representatives of the Department of Recreation and Parks, there were present at this meeting, held on July 8 or 9, 1948, Petitioners, Harold Buchman and Stanley Askin, a Mr. Brown (not otherwise identified), a photographer from the Afro-American, a reporter from the Afro-American and possibly one or two other persons (T. pp. 45-46). Mr. Hook stated that he could not show the representatives of the Young Progressives a rule of the Department regarding segregation on public tennis courts. However, he did offer to show them the minutes of the Board's ruling setting forth the policy regarding such segregation. *Mr. Hook suggested to Mr. Askin that "if it was a question of a Court test case, * * * then why didn't he just apply for the permit in the usual way, and state that it was going to be a mixed group, and * * * I know it will be denied, and then he would have a test case, * * *." Mr.*

*Hook further suggested that such procedure would "avoid embarrassment or any trouble that might arise * * * if they attempted to play tennis"* (T. pp. 46-47). To this suggestion, Messrs. Askin and Buchman replied that "they would obtain the permits as then seen fit" (T. p. 47).

Sometime during the week prior to July 11, 1948, the Young Progressives of Maryland made arrangements for an inter-racial tennis game with the Baltimore Tennis Club, a negro organization. The game was to be played at Druid Hill Park on July 11, 1948 at 2 P. M. Also during that week the Young Progressives had a notice mineographed regarding the proposed action to question the aforesaid segregation policy of the Park Board (T. pp. 63, 91). This notice read as follows:

"'Kill Jim Crow!"
"Demand Your Rights!"

"Organize to smash discrimination in recreational facilities. No law has ever been passed by the City Council stating that Negro and white citizens must use separate park facilities. On Sunday, July 11th at the Druid Hill clay tennis courts near Auchentoroly Terrace and Bryant Avenue (near the hot house) promptly at 2 P. M. Negro and white citizens are going to insist on their lawful rights to use these courts!

Be present to lend your support!
Sponsored by: The Young Progressives of Maryland
328 N. Charles Street, Plaza 2470

Henry Wallace Says: 'Jim Crow In America Has Got To Go'."

Some of these notices were distributed prior to the meeting with Mr. Hook, some afterwards. The notice was mailed to the membership of the Young Progressives (about five hundred); other copies were distributed by hand, but to whom and in what manner Mr. Askin could not state (T.

pp. 91, 107). Although all copies of the leaflet which were distributed were not identical, they were substantially the same (T. pp. 92-93; 196-7). Obviously, from the testimony of Petitioners' witnesses, a number of copies of the leaflet were distributed through the C. I. O. Seamen's Union (T. pp. 196-7; 201; 155; 172).

All of this activity was participated in by Petitioner Askin. Petitioner Buchman either participated in the discussions, decisions and acts or knew of, and acquiesced in, them. Mr. Buchman attended the interview with Mr. Hook; he was consulted by the Young Progressives regarding the action which they proposed to take and told them: "I saw no reason why they shouldn't proceed" (T. p. 107). He knew that the leaflets had been prepared and distributed (T. p. 108). Petitioner Winkler was a member of the Young Progressives and participated in the arrangements for the proposed action. He took out, in his own name, the permit for the courts on which they played. He arranged to meet the players at Pennsylvania and Fulton Avenues (a short distance from the Park). He met the players at that location and furnished his car as part of the transportation from that point to the Park (T. p. 198).

Permits for three courts in Druid Hill Park (reserved by the Park Board for white players) were obtained by white members of the Young Progressives. The Courts were reserved for 2:00 P. M., on July 11, 1948. At about 1:30 P. M., on that date, those who were to participate in the tennis game, both white and colored players, met at Pennsylvania and Fulton Avenues. They proceeded to the Park, arriving there just before 2 P. M. They took over the three reserved courts as follows: Petitioner Askin played on the same court with Albert Blank, one of the white defendants who was acquitted, and with two of the

male colored defendants who were acquitted (T. p. 57). Petitioner Winkler played on the adjoining court with Morris Kalish (white) and with James E. Robert (colored) and Royal Weaver, Jr. (colored) (T. p. 169). On the third court, Mary Coffee (colored) played with her sister Gloria (colored) and Mitzi Freishtat (white) and Jeannette Fino (white). Mary had arrived late and, wanting to play, took the place of some unnamed person who had started the game.

After they had played for about fifteen minutes, Captain Gaeng arrived with several of the Park police — all in uniform. He observed the tennis games for a few minutes and then went out with the other officers, on the court where Mr. Askin was playing. He called the group on that court together and advised them that mixed tennis was forbidden and requested that they stop. Mr. Askin showed him his permit. Captain Gaeng stated that he was not interested in the permit but that it was forbidden for them to play in a "mixed group, colored and white". At that point, Mr. Buchman, who was not a participant in any of the games, walked up to the group and, according to Captain Gaeng, Mr. Buchman stated: "We are not going to stop playing, and he told the group to go ahead and play". Thereupon, the police withdrew (T. pp. 56-58).

Captain Gaeng sent for additional police. When they arrived, about twenty minutes later, Captain Gaeng and his officers returned to the courts and again requested that the participants stop playing. The players again refused to stop. Captain Gaeng thereupon ordered the police to arrest the players. Several sat down on the tennis courts (T. pp. 187, 197, 198) and refused to be removed. Captain Gaeng gave instructions to pick them up bodily and take them to the wagon (T. p. 58).

The spectators, numbering between one hundred and fifty and three hundred, depending on whose testimony you believe, crowded close to the wire backstops. Petitioner Buchman said to an unidentified man "Get the rest of them up there" and the two of them urged the spectators to get close to the backstop (T. p. 186). The crowd was "milling around" before the officers went on the courts, and after the arrests started, people were "swarming in the drive" around the patrol wagon (T. p. 192). Several people, including Petitioners Buchman and Regina Silverberg urged the players to continue (T. pp. 184, 186, 188, 191, 192). The witness Wilkinson testified that Petitioner Buchman said to the spectators: "Don't let them get away with this" (T. p. 186). As arrests were made, the spectators began to yell and to sing and to shout encouragement to the players (T. pp. 183, 186, 189, 192, 194, 196, 200-1).

Patrolmen Banyus and Gray testified regarding the arrest of Regina Silverberg (T. pp. 187-8, 191). She was observed at the northeast corner of the tennis courts; she got up as the police passed and told the girls on the tennis courts "to keep playing, that the police could do nothing, * * *"; she shouted at the officers that they were "Fascists" and "were doing things against the law"; she had previously been warned by an officer not to shout so loudly and to keep quiet for she was inciting a riot; she stated that "I don't have to keep quiet. I am a taxpayer and this is a free country, and I can say what I want to"; as she was being arrested she resisted and said: "Take your arm off of me you Gestapo and Fascist, you cannot arrest me until I see my attorney"; she also said she was not going in a police car, that she wanted to go in the wagon and was accommodated. A number of people gathered in the roadway and three cars stopped in the road blocking traffic (T. pp. 188-9). Petitioner Silver-

berg admitted making some of the statements testified to by the police (T. p. 142). Mrs. Silverberg went to Druid Hill Park that day as a result of reading one of the leaflets, referred to above, which her husband had brought home. This leaflet had been picked up by her husband at the Union Hall and had been distributed by a group calling themselves "Seamen for Wallace" (T. pp. 139-140).

Petitioner Swann, according to the testimony of police, resisted arrest and made a motion with his arm as if he would strike one of the officers. He swore at them, asked "Is this what we fought for?", called the police Fascists and was generally out of hand (T. pp. 183, 187, 190). He was a member of the C. I. O. Seamen's Union, had learned of the proposed action through the leaflets left at the Seamen's Hall and had gone to Druid Hill Park for the express purpose of participating in the activities *although he did not play in the game* (T. pp. 155-157).

After the arrest of Petitioner Swann, Petitioner Collidge, who had been in the crowd yelling and waving his hands, jostled alongside of the police and insisted that they arrest him, stating: "Well, you are arresting your own people. You have no right to arrest this man. You are a Fascist, Gestapo agent, I am in sympathy with this man, I shall go along with him" (T. pp. 182-3, 190). Collidge also had gone to the Park that day as a result of having seen one of the leaflets at Union Hall (T. p. 201). Petitioner Vestal did and said substantially the same thing as Collidge (T. p. 191).

When Sergeant Bell asked Petitioner Winkler to stop playing, he refused to do so. When placed under arrest, Winkler sat down on the court and "we had to carry him off" (T. pp. 184, 193, 199).

Petitioners' witnesses corroborated the State's testimony to the effect that there was a considerable amount of sing-

ing of patriotic songs, particularly "America" and what was referred to as the Negro National Anthem (T. pp. 194, 196, 200, 201); also that ten or twelve players met at Pennsylvania and Fulton Avenues prior to going to Druid Hill Park for the game (T. pp. 194-5, 198); also that several of the players sat down on the courts when requested by the police to stop playing (T. pp. 197-8, 199-200); also that a number of statements were made such as "let them play", "This is America, not Germany", and similar expressions (T. pp. 193-4, 196, 200-1).

ARGUMENT

I.

IS ANY FEDERAL CONSTITUTIONAL QUESTION PRESENTED IN THIS CASE?

It is respectfully submitted that Petitioners have taken what is actually a very simple problem, and, by use of flowery language and a complex argument, have distorted it beyond all recognition.

Because of this, Respondent wishes first to consider exactly what was involved in the trial in the *nisi prius* court. Petitioners were tried in the Criminal Court of Baltimore on several charges, including that of conspiracy to disturb the peace (T. pp. 10-11). Disturbance of the public peace was recognized at common law as a criminal offense and is such today under the laws of the State of Maryland.

Wharton, *Criminal Law*, Vol. 1, Sec. 21, page 30:

> *"Disturbances of the public peace indictable at common law.* (1) Acts, therefore, provocative of public disturbance, are indictable though there be no English precedent for the indictment. Hence it has been held indictable to drive a carriage through a crowded street in such a way as to endanger the lives of the passers-by; to disturb a congregation when at religious

worship; to go about armed with dangerous and unusual weapons, to the terror of citizens; to raise a liberty pole in the year 1794, as a notorious and riotous expression of ill-will to the government; to tear down forcibly and contemptuously an advertisement set up by the commissioners, of a sale of land for county taxes; to agree to fight, though no fight takes place; to break into a house in the day or nighttime, and disturb its inhabitants; violently to disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot; to attempt to kidnap another; *and, in short, to do any act which may create a public disturbance, provided that such be the natural consequence of the act.*" (Italics supplied.)

Wharton, *Criminal Law*, Vol. 2, Sec. 1881, page 2212:

"Breach of the peace occurs through personal violence, and also through acts or words, whether of turbulence and open disorder or of public indecorum. It includes saying or doing that which tends to provoke or incite others to violence; all acts and attempts to produce disorder by oral or written expression or communications for the purpose of weakening legal, religious, or moral restraints against excesses, in word or act, of emotions, affections, or desires; the saying or doing that which alarms or arouses terror or fear, or creates disquieting apprehensions, or disturbs the tranquillity and repose enjoyed by good citizens where order prevails."

Constitution of Maryland, Declaration of Rights, Article 5:

"That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of

> Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. * * *"

The utterance of abusive words "in such a place, as to attract a crowd of a hundred persons, and when that crowd is collected the party continues to use the same abusive language, nobody can tell whether the passions of the crowd may not be thereby inflamed, and whether they may not proceed to execute the vengeance which the party himself invokes and threatens" constitutes a breach of the peace. *Cohen v. Huskisson*, S. C. M. & H. 150; 6 *L. J. M. C.* 133; 1 Jur. 559; 150 English Reports (full reprint) 845, 847-8; *Com. v. Foley*, 99 Mass. 497, 499; *People v. Nesin*, 167 N. Y. Supp. 49; *People v. Wallace, et al.*, 83 N. Y. Supp. 130, 132-3.

In the case of *Cantwell v. Conn.*, 310 U. S. 296, 309-310, 84 L. Ed. 1213, 1221, this Court, although deciding the case in favor of the Appellant, conceded the foregoing to be the rule, saying (per Mr. Justice Roberts):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any

> proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

It is equally true that to conspire or combine to accomplish a criminal or unlawful purpose or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means is an indictable offense at common law.

In the leading case of *State v. Buchanan*, 5 H. & J. 317, at pages 351-352, the Court of Appeals of Maryland, through Judge Buchanan, discussed this question at some length and reached the following conclusions:

> "That a conspiracy to do any act that is criminal *per se*, is an indictable offense at common law, for which it can scarcely be necessary to offer any authority * * *. That a conspiracy is a substantive offence and punishable at common law, though nothing be done in execution of it."

In another leading conspiracy case, *Lanasa v. State*, 109 Md. 602, at page 607, the Court of Appeals of Maryland, through Judge Burke, said:

> "Upon the settled law of this State and upon the authority of well-reasoned cases in other jurisdictions, we cannot agree that the count assailed is in any respect defective, or that the judgment should be arrested. A conspiracy may be described in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not essential that the act intended to be done should be punishable by indictment. The *essence* of the offense consists in the *unlawful agreement and combination* of the parties; and, therefore, it is completed whenever such combination is formed,

> although no act be done towards carrying the main design into effect. 3 *Greenleaf on Evidence*, 2nd Ed., Secs. 89-91."

To the same effect, see also *Garland v. State*, 112 Md. 83, at pages 87-90; *Archer v. State*, 145 Md. 128, at pages 144-147; *Gillespie v. State*, 147 Md. 45, at pages 55-59.

In *Wharton's Criminal Law*, Volume 2, Section 1620, pp. 1888-9, it is stated that:

> "AND SO OF CONSPIRACY TO COMMIT BREACH OF THE PEACE. No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which, in another relation, will be subsequently considered, *viz.*, conspiracies to hiss an actor from the stage, so as to stimulate a riot, and to prevent by violent means the introduction of the English language into a church. * * *"

Petitioners, in fact, do not question the constitutionality of the charge of conspiracy to disturb the public peace. Examination of Petitioners' brief in this case shows that there is not one word directed toward the contention that the law under which Petitioners were tried is unconstitutional. Their claim that their rights under the First and Fourteenth Amendments to the Constitution of the United States were abridged is based solely upon the contention that the policy or rule of the Park Board of Baltimore City regarding segregation of races on the public tennis courts is invalid. That policy or rule, as is hereinafter demonstrated, is only incidentally involved in this case.

Of course, there could be no possible claim that the law under which the charge in the fifth count of the indictment was laid is unconstitutional. As stated by Wharton, *supra*, "No doubt a conspiracy to get up a public disturbance is indictable". Under the Maryland cases referred to above,

it is a crime for two or more persons to combine "to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means". It follows, therefore, that the only question presented to the trial court was one of fact, viz., did the evidence in the case support the charge in the indictment? The trial judge, sitting as a jury, so found. His finding, upon motion for a new trial, was considered by nine of the members of the Supreme Bench of Baltimore City. Under the rules of the Supreme Bench, the trial judge did not sit upon the hearing of said motion. Seven of the nine judges who heard the motion sustained the finding of the trial judge. As is hereinafter indicated (infra, pp. 15-16), under the laws of the State of Maryland, the only review which may be made of the evidence is upon a motion for a new trial. There is no appeal from the ruling on such motion. *Quesenbury v. State*, 183 Md. 570, 573; *Snyder v. Cearfoss*, 186 Md. 360, 366-367; *O'Donnell v. State*, 188 Md. 693, 699; *Lucich, et al. v. State*, ... Md. ....., (The Daily Record, February 24, 1950). In the latter case, decided by the Court of Appeals of Maryland on February 10, 1950, that Court said:

> "* * * We cannot review the action of the trial court in denying the motion for a new trial."

It is respectfully submitted that in this case this Court cannot review the evidence so as to determine whether or not the charge laid in the indictment was supported by the facts. Under the provisions of the Constitution of Maryland, Article 15, Section 5, it is provided: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact." In a long line of cases decided by the Court of Appeals of Maryland, beginning with *League v. State*, 36 Md. 257, it has been held that in a case where the accused has elected to be tried before the court without a jury, the

court is substituted for the jury and has the same duties and functions in passing upon the guilt or innocence of the accused. In such event, no question of the sufficiency of the evidence can be raised on appeal because the position of a judge in such a case is analogous to that of a jury and he is, therefore, the final judge of both the law and the fact. See also *Folb v. State,* 169 Md. 209, 211; *Berger v. State,* 179 Md. 410, 416; *Meyerson v. State,* 181 Md. 105, 112; *Smith v. State,* 182 Md. 176, 188-189; *Bright v. State,* 183 Md. 308, 318; *Peters and Demby v. State,* 187 Md. 7, 16-17; *Abbott v. State,* 188 Md. 310, 313; *Davis v. State,* 189 Md. 269, 274 (Adv. Shts.), 55 A. (2) 702, 704; *Hill v. State,* ..... Md. ....., 59 A. (2) 630, 633; *Swann v. State,* ..... Md. ....., 63 A. (2) 324, 325; *Slansky v. State,* ..... Md. ....., 63 A. (2) 599, 606; *Juratovac v. State,* ..... Md. ....., 69 A. (2) 247-248; *Grear v. State,* ..... Md. ....., The Daily Record, February 16, 1950; *Debinski v. State,* ..... Md. ....., The Daily Record, March 2, 1950.

The effect of the above quoted constitutional provision and of the decisions thereunder is to deprive an accused in a criminal case of the right of appeal to the Court of Appeals of Maryland where the only question which might be presented on such appeal is the legal sufficiency of the evidence. In other words, so far as the legal sufficiency of the evidence is concerned, the trial court in Maryland is the court of last resort.

No constitutional objection can be raised concerning this procedure. This Court has, on a number of occasions, said that the guarantees of the Federal Constitution do not include a guarantee that each accused will be tried according to Federal procedure. In this respect, the States are left to their own devices, provided that the judicial process is not reduced to a sham.

The case of *Fay v. People,* 332 U. S. 261, 91 L. Ed. 2043, challenged the constitutionality of the special or so-called "blue ribbon" jury as used in New York. In holding that such procedure did not abridge any of the Appellant's constitutional rights, this Court said at U. S. pp. 294-5, L. Ed. pp. 2063-4:

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.
>
> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247, and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality."

In the case of *Bute v. Illinois,* 333 U. S. 640, 649, 92 L. Ed. 986, 991-2, the question was raised as to whether, in the case of a non-capital crime, the State is required to tender the assistance of counsel to the accused. This Court held that the State was not so obligated and, among other things, said:

> "* * * The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty

> without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely 'nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.' This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions * * *.' Hebert v. Louisiana, supra (272 U. S. at p. 316, 71 L. Ed. 272, 47 S. Ct. 103, 48 A. L. R. 1102). * * *."

See also *Sparf v. United States,* 156 U. S. 51, 102, 39 L. Ed. 343, 361, where this Court said:

> "* * * Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury."

See also *Gardner v. Michigan,* 199 U. S. 325, 333-4, 50 L. Ed. 212, 217; *Mallett v. North Carolina,* 181 U. S. 589, 598-9, 45 L. Ed. 1015, 1020.

However, consideration of the facts in the present case clearly shows that the trial judge, sitting as a jury, was justified in finding Petitioners guilty of the charge of conspiracy to disturb the peace. Petitioners argued below and contend here that they were not guilty of said charge for the reason that they were testing the validity of the aforesaid policy or rule of the Park Board. That did not make them immune from prosecution if they committed a crime in taking such action. The State did not charge at the trial

of this case, nor does it now contend, that *submission to arrest,* in itself, as means of testing the validity of a statute, constitutes a crime. *The State charged at the trial and now contends that the acts of Petitioners constituted a crime,* based on the facts set forth below, *because Petitioners agreed and combined to test the aforesaid Park Board policy by unlawful means, viz. disturbance of the public peace.*

All of the Petitioners knew that the Department of Recreation and Parks had an announced policy against tennis games on public courts involving members of the white and colored races. *That was the sole reason for the action which they took.* Messrs. Askin and Buchman knew of that policy as the result of the interview with Mr. Hook of the Park Board. In fact, they knew of it when the letter of July 3, 1948, was written. Mr. Winkler knew of that policy as a result of attendance at meetings of the Young Progressives of Maryland, at which it was determined that it should be tested. Mrs. Silverberg and Messrs. Collidge, Winkler, Vestal and Swann knew of that policy by reading the notice regarding the proposed meeting at Druid Hill Park.

All of the Petitioners knew that the means proposed to question this policy would necessarily involve a breach of the public peace.

The notice just referred to was prepared with the knowledge of Askin, Buchman and Winkler. That notice in part, reads as follows:

"Demand Your Rights!"

> "Organize to *smash* discrimination in recreational facilities. * * * Negro and white citizens are going to *insist* on their lawful rights to use these courts."
>
> *"Be present to lend your support!"*
>
> (Italics supplied.)

Petitioner Buchman admitted that the wording of this notice was "exuberant" and "militant" (T. p. 108). Clearly the language of the notice is intemperate. Such phrases as *"Kill Jim Crow!", "Demand your Rights!", "Organize to smash discrimination * * *", "Insist on their lawful rights"* (Italics supplied), all tended to inflame the minds of those persons sympathetic with the views of the organizers of this meeting. That they were intended to have that effect is the only inference which can be drawn from the evidence in this case. No other purpose could be involved in the request contained in the notice; viz. "Be present to lend your support!" In addition to this, the comments and actions of Petitioners who were spectators certainly were not peaceful (*supra*, pp. 7-10). Petitioner Buchman's injunction to an unidentified man "Get the rest of them (the crowd around the backstop) up there"; the crowd "milling around"; directions to the players "to keep playing, that the police could do nothing"; Mr. Buchman's statement to the spectators "Don't let them (the police) get away with this"; use of abusive language toward the police such as "Fascist" and "Gestapo"; — not only tended to cause a breach of the peace but actually, under the decisions referred to above, constituted disturbance of the peace.

There was no necessity for anyone other than two players, one Negro and one white, to be present at Druid Hill Park on the day in question if the sole intention was to question the validity of the Park Board policy by passive submission to arrest. The only purpose of having a large gathering attend the tennis game was to create a breach of the peace so that there would be no question about the parties being arrested. It was through no fault of Petitioners that the Park Police did not have a full scale race riot on their hands.

This possibility and the social concepts, prejudices, and fears which exist today in the minds of many people in these States may be regrettable and unjustified. *However, they are a reality.* They must be faced by any Southern State which desires to furnish equality of opportunities, and at the same time preserve harmony and peace between the two races. This condition may be reprehensible to many who view it from afar. But the possibility of its existence is not beyond understanding even in the Northern States. Therein have occurred the Harlem, Chicago, and Detroit race riots, (Myrdal, *An American Dilemma*, p. 566; Murray, *The Negro Handbook*, 1949, pp. 108-110, 190-191). More recently, in St. Louis, Missouri, on June 21, 1949, a public swimming pool was opened to both races. *Life* magazine for July 4, 1949, pages 30-31, reported:

> "* * * But when the city opened all of its swimming pools to Negroes on June 21 for the first time in history, progress stopped. That afternoon police had to escort 40 Negro swimmers through a wall of 200 sullen whites at the Fairground Park pool. After nightfall bands of white hoodlums took off after any Negroes found anywhere near the park, beating and kicking them *(opposite)*. It was 2 a.m. before police got things under control. Miraculously nobody was killed, but 15 persons were hospitalized, 10 of them Negroes. It was St. Louis' first serious race riot, and it underscored the inflexibility of the color-line barrier dramatized by the movie *Lost Boundaries* (pp. 64-66). Mayor Joseph Darst quickly took what for practical reasons was perhaps the only possible action. Segregation was restored to St. Louis swimming pools."

The same thing happened when the races were mixed in public swimming pools operated by the Department of the Interior in Washington, D. C. In the issue of *Time* magazine for July 11, 1949, on page 21 under a picture of the violence,

the following was reported under the heading "Not Ready Yet":

> "These pictures show what happened in the nation's capital last week when the Interior Department decided to enforce a non-segregation policy in public pools where only whites had swum before. The result was two days of small-scale rioting at the Anacostia pool, where 17-year-old Joan Sexton suffered two broken toes under the hoofs of a park policeman's mount *(left)* and eight other persons were injured in a series of nasty scrapes which were broken up finally by police. An Interior Department official blamed the rioting on 'Communist agitators,' regretfully closed the pools 'until further notice.' 'Washington,' observed the *Evening Star,* 'is not ready for non-segregated swimming.' "

In East St. Louis, Illinois, it was decided by the local Board of Education to have mixed schools on January 30, 1950, after exercising their right to have separate schools for 85 years. About 100 Negro students enrolled in schools previously attended only by white children. Two white children transferred to a school which had been all Negro. At one school there was a noticeable decrease in the number of white students. But police authorities even in that Northern State anticipated violence. All police officers were assigned to 12-hour shifts, detectives changed to their uniforms, and as many as six men rode in one squad car to guard against any outbreak on the first day of the integration. Nine squad cars were on duty, although normally there are only three in East St. Louis, and five cars from the St. Clair County sheriff's department stood by. (East St. Louis Journal, Jan. 30, 1950; New York Times, Jan. 31, 1950.)

And in Alton, Illinois, on January 23, 1950, 175 Negro students appeared at the white schools and attempted to secure admission to the classrooms. The Alton Evening

Telegraph, in its lead paragraph of the page-one-story said, "An air of tension prevailed throughout the Alton School system today as 175 Negro students appeared at white schools and sought admission * * *." After presenting themselves at white schools for three days, they returned to the schools provided for Negroes and brought suit to stop payment of State funds to the Alton School District. Various forms of racial disturbances followed. (Alton Evening Telegraph, Feb. 5 through 8, 1950.)

If these conditions exist in the North, it should be understood that they may exist to a greater extent in the more heavily mixed population of the South.

Referring again to the evidence in the case at bar — practically all of it either admitted or uncontradicted — it certainly was more than sufficient to support the fifth count in the indictment.

II.

WERE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES ABRIDGED BY THEIR ARREST AND CONVICTION ON THE CHARGE OF CONSPIRACY TO DISTURB THE PEACE?

Petitioners' argument that their constitutional rights, viz. of freedom of speech, press and assembly, were abridged, although not captioned in their brief, is in fact considered under several different sub-headings. Respondent's reply will consider them in the order in which they are presented in Petitioners' brief under appropriate sub-heads.

Respondent respectfully submits that this question is not properly before this Court. As has been stated heretofore in this brief, *the crux of the Fifth Count of the Indictment is that the Petitioners conspired to disturb the peace. Conspiracy to accomplish a lawful purpose by unlawful means is just as much a crime as conspiracy to accomplish an unlawful purpose* (cases cited under point I).

A.

Was There an Effective Rule of the Park Board of Baltimore City Concerning Segregation on Public Tennis Courts?

Petitioners argue (Pet. Brief pp. 20-22) that there was no legal prohibition against inter-racial games on public tennis courts in Druid Hill Park. As has been previously noted, this question is only incidentally involved in this case. The aforesaid Park Board rule or policy was simply the *raison d'etre* for Mr. Askin's letter of July 3, 1948, and for everything which followed. It was merely the background for the action at Druid Hill Park on July 11, 1948.

However, there was a legal prohibition against tennis games on public courts between members of the white and Negro races. Petitioners admit that certain courts in Druid Hill Park were reserved for members of the white race and that there were eight courts reserved for members of the Negro race. This was known to Petitioners. The Park Board of Baltimore City had adopted a policy or rule regarding segregation of the two races on public park tennis courts, even though it had not been enacted as a formal rule and printed in the Park Board rule book. All of the Petitioners were cognizant of the existence of this policy. The meeting at Druid Hill Park on July 11, 1948, and all the activities of Petitioners which preceded that meeting were directed toward questioning the validity of that policy or rule.

In Missouri there was no express constitutional provision requiring that the white and Negro races be separated for the purpose of higher education. The statute of that State provided for the establishment of a Negro law school. It did not, however, provide for segregation of the races so far as legal education was concerned. However, the Supreme Court of the State of Missouri and this Court considered

that there was an effective policy for segregation of the races for educational purposes. *Missouri ex rel Gaines v. Canada,* 305 U. S. 337, 83 L. Ed. 208, page 210. In that case, this Court found that the State of Missouri had failed to carry out that policy so far as law school education was concerned by providing equal facilities for the white and Negro races.

Respondent submits that, even if this Court deems it necessary to find a legal policy regarding segregation of the races on public tennis courts to support the judgment in this case, there is no doubt that there was such a legal and effective policy of the Park Board of Baltimore City and that Petitioners knew of it.

B.

Were Facilities Furnished by the Park Board of Baltimore City for Tennis Players of the Negro Race Equal to Those Furnished for Tennis Players of the White Race?

Were equal facilities afforded members of the two races for play on public tennis courts? Petitioners make no claim that the quality of the tennis courts provided for Negroes in Druid Hill Park was not equal to the quality of tennis courts provided for whites. Their sole contention (Pet. Brief pp. 22-23) is that there is not equality in the number of courts available to the two races. The equality rule certainly does not require that Baltimore City provide a tennis court reserved for Negroes for each tennis court reserved for whites. In fact, under the decision of the Court of Appeals of Maryland in *Durkee v. Murphy,* 181 Md. 259, this claim could not be made. Although there are three public golf courses available to white players, that Court said in that case that only the quality of the

Carroll Park course must be equal to the courses afforded for whites. That Court did not say that Baltimore City had to provide three golf courses for Negroes. A number of Negroes interested in tennis testified on behalf of Petitioners in this case. None of them claimed either that there are insufficient courts reserved for them or that the courts reserved for them are inconveniently located. Petitioners rely solely on the total statistics which show that one hundred and eight courts are reserved for white people and only eight courts for Negroes, and that the proportion of colored citizens in Baltimore City to white citizens is greater than that. Petitioners completely failed to demonstrate a need either for more tennis courts reserved for Negroes or for more locations of such courts.

Certainly, under the evidence in this case, the Court, sitting as a jury, could readily determine that equal public tennis facilities are provided by Baltimore City for members of the two races. Also, it is to be noted that in the case of *Boyer, et al v. Garrett, et al,* United States District Court for the District of Maryland, ... F. Supp. ....., (The Daily Record, Baltimore, Feb. 10, 1950), a civil suit questioning the aforesaid Park Board policy or rule filed subsequent to the institution of these proceedings, a stipulation was filed in which it was admitted for the purposes of that case that the public tennis court facilities afforded by Baltimore City for Negroes and whites are equal.

C.

Is Segregation of the Negro and White Races "Outmoded" and Unconstitutional?

Petitioners contend (Pet. Brief, pp. 23-31) that even if there is an effective rule of the Park Board of Baltimore City providing for segregation of the white and Negro races on public tennis courts, such rule is unconstitutional. The

rule of the Park Board in this respect was entirely proper and valid. In the case of *Plessy v. Ferguson,* 163 U. S. 537, 41 L. Ed. 256, this Court expressly held that segregation of the races does not contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, provided that the facilities furnished are equal. This Court there said (U. S. pp. 543-4; L. Ed. p. 258):

> "A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the 13th Amendment is strenuously relied upon by the plaintiff in error in this connection.
>
> * * * * * *
>
> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

Although Petitioners contend that this case was decided by the Supreme Court in a "dark era" and is "outmoded", it is undoubtedly still the law in the United States. *Missouri ex rel Gaines v. Canada, supra; McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160; 59 L. Ed. 169, 173-4; *Durkee v. Murphy, supra; Law v. Mayor and City Council of Baltimore*, 78 F. Supp. 346, 347; *Boyer, et al. v. Garrett, et al., supra.*

In discussing this claim, Petitioners cite thirty-seven cases, Congressional debates and reports concerning the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and the Report of the President's Committee on Civil Rights (U. S. Government Printing Office, 1947). In general, these cases cover the judicial history of the 14th Amendment in this Court from the Civil War to the present day. They run the gamut from the *Slaughterhouse Cases*, 16 Wall. 36, to and including *Terminiello v. Chicago*, ... U. S. ....., 93 L. Ed. 865. In between, they cover cases dealing with discrimination in railroad and bus accommodations; anti Klu Klux Klan Acts; the Civil Rights statute; exclusion of Negroes from juries; seventeen different kinds of discrimination in governmental classifications; extortion of confessions; laws directed at labor unions and subversive groups; segregation in schools, on golf courses and in swimming pools; the trials and tribulations of Jehovah's Witnesses; exclusion of Japs from land ownership and fishing licenses; and the validity of ordinances and covenants restricting use or ownership of lands. They ice the cake with an extract from the recent Report of the President's Committee on Civil Rights. By this recital, Respondent does not wish to make light of the importance of the 14th Amendment. *However, it is not involved in this case* in spite of the fact that Petitioners would like to persuade the Court that it is. The

only real question presented to the Trial Judge was: Did Petitioners get together and agree to question a Park Board policy, which they believed to violate the 14th Amendment, by unlawful means, viz. disturbance of the public peace? The trial court determined that they did and that decision is not subject to review by this Court. Finally, none of the cases cited, either disaffirms the rule of *Plessy v. Ferguson, supra,* or gives the slightest indication that said case is not the law of the land.

D.

Were Petitioners' Constitutional Rights of Freedom of Speech, Press and Assembly Abridged?

Petitioners' claim (Pet. Brief, pp. 31-35) that their constitutional rights of freedom of speech, press and assembly were abridged by the actions of the Park Board of Baltimore City and the Park Police and by their conviction under the charge of conspiracy to disturb the peace. As indicated above, Petitioners do not question the constitutionality of the charge. They attempt to bring into this case by the back door the question of whether the segregation policy or rule of the Park Board violates their constitutional rights. As has been previously stated, this policy or rule is only incidentally involved in this case, and, whether or not, if effective, it violates any of the constitutional rights of the Petitioners has nothing whatsoever to do with whether the judgment of the trial court should be affirmed.

The question of the validity of the Park Board policy regarding segregation of the races on public tennis courts has been already discussed (*supra,* pp. 26-29). As has been previously stated, the existence of the constitutional rights referred to does not guarantee immunity to prosecution in every case. Such rights are not absolute.

In the case of *N. L. R. B. v. M. E. Blatt Co.*, 143 F. (2d) (C. C. A. 3d) 268, 274, (certiorari denied, 323 U. S. 774, 89 L. Ed. 619), it was stated categorically that "the guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal action."

In *Robertson v. Baldwin*, 165 U. S. 275, 281, 41 L. Ed. 715, 717, this Court said:

> "* * * The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*United States v. Ball*, 163 U. S. 662, 672; 41 L. Ed. 300, 303); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. *Brown v. Walker*, 161 U. S. 519; 49 L. Ed. 819; and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses

> against him prevent the admission of dying declarations, or the deposition of witnesses who have died since the former trial."

Certainly, it cannot be argued that the right of freedom of assembly would bar a prosecution for riot nor can it be said that the right of freedom of the press would prevent prosecution on a charge, for example, of conspiracy to violate the Espionage Act *(Schenck v. U. S.*, 249 U. S. 47, 63 L. Ed. 470). It is equally true that neither the right of freedom of speech, nor the right of freedom of the press, nor the right of freedom of assembly endows Petitioners with immunity from prosecution on a charge of conspiracy to disturb the peace. As previously stated, the only question presented was whether the verdict of guilty was warranted under the evidence presented and that was a question of fact subject to the determination of the trial judge sitting as a jury and to his judgment alone.

Petitioners cite, and apparently rely heavily upon, the case of *Terminiello v. Chicago,* (..... U. S. ....., 93 L. Ed. 865, 867) *supra.* In that case an ordinance of the City of Chicago was involved. The note on page 867 (L. Ed.) quotes from that ordinance as follows:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense."

Instructing the jury, the trial court defined the words "breach of the peace" to include speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance". The charge against

the defendant was based upon language used by him in a speech under the auspices of the Christian Veterans of America. The auditorium in which the speech was made was filled with over eight hundred persons. There were about one thousand persons gathered outside the auditorium protesting the meeting.

The majority of this Court held that the ordinance as "read" and "construed and applied" by the trial court violated the 14th Amendment. The case was reversed solely because of the quoted interpretation of the trial court. This Court determined that, *as interpreted by the trial court,* the ordinance constituted an abridgment of the Appellant's freedom of speech.

It is respectfully submitted that the *Terminiello* case is clearly distinguishable from that presented here. In that case, there was a direct attack on the constitutionality of the ordinance as construed by the trial court. In the present case, no attempt whatsoever has been made to question the constitutionality of the law under which the Petitioners were charged and tried.

In their brief filed in the Court of Appeals of Maryland, Petitioners also cited and relied heavily upon the case of *Schenck v. U. S., supra.* It is worthy of note that in their brief filed in this Court in support of the Petition for the writ of certiorari, Petitioners fail to refer to that case. The reason for such failure is obvious. It is almost on all-fours with the present case.

There, the indictment charged the Appellants with conspiracy to violate the Espionage Act of 1917 by, among other things, obstructing the recruiting and enlistment service of the United States while the United States was at war with the German Empire. In support of the charge, the

Government proved that, with the knowledge and consent of the Appellants, fifteen thousand leaflets had been printed and distributed. In describing the leaflet, Mr. Justice Holmes said:

> "In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity, in the interest of Wall Street's chosen few. It said: 'Do not submit to intimidation;' but in form at least confined itself to peaceful measures, such as a petition for the repeal of the act. The other and later printed side of the sheet was headed, *'Assert Your Rights'*. It stated reasons for alleging that anyone violated the Constitution when he refused to recognize 'your right to assert your opposition to the draft', and went on: 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.' It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the Conscription Law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., etc., winding up, *'You must do your share* to maintain, support, and uphold the rights of the people of this country.' *Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.* The defendants do not deny that the jury might find against them on this point." (Italics supplied.)

The Supreme Court had no difficulty in determining that the conviction of the Appellants was proper and affirmed the judgment of the trial court. Mr. Justice

Holmes' reference to the leaflet, italicized above, is pertinent, if not conclusive, here.

Finally (Petitioners' Brief, p. 32) Petitioners state that the prosecution urged that the policy was justified in order to avoid possible disorder which might ensue where the Negro and white races participated jointly in a sports program on public facilities. Respondent's contention below was, and here is, that the actions of the Petitioners constituted a conspiracy to disturb the peace. Justification of the policy regarding segregation is based upon a long-standing policy of the State of Maryland which has, in fact, received support from this Court. Petitioners also claim that, because of the fact that they were allegedly testing a disputed right, their various freedoms have been infringed. The mere fact that Petitioners were attempting to question or test a disputed right does not make the effect of the constitutional provisions absolute. They were obliged to choose a method of attack which would not violate the criminal laws of the State of Maryland. The responsibility for electing the method which in fact did contravene the criminal laws of the State lies upon the heads of the Petitioners—not the Respondent. The appropriate and proper method of testing the restrictions to which Petitioners objected was suggested to them explicitly by Mr. Charles A. Hook, Superintendent of Parks of Baltimore City (T. 46-47).

III.

DID THE COURT OF APPEALS ERR IN ITS REFUSAL TO EXAMINE THE EVIDENCE IN THE CASE SO AS TO DETERMINE WHETHER THE CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONERS HAD BEEN ABRIDGED?

Although it is not clear how it adds any light to this case, Petitioners' final contention is that the Court of Appeals of Maryland erred in its refusal to examine the evi-

dence in the case so as to determine whether the constitutional rights asserted by Petitioners were infringed.

Examination of the majority opinion of the Court of Appeals of Maryland makes it abundantly clear that said Court had no right whatsoever to re-examine the evidence in this case. (See cases cited supra, pp. 15-16). The only possible exception to the rule is in a case where the trial was so unfair as to amount to a denial of due process under the 14th Amendment. *Raymond v. State,* ..... Md. ....., 65 A. 2d 285, 288. In the present case, the Court of Appeals did consider claims by Petitioners that the trial court was unfair and that they were, therefore, denied due process of law. It is interesting to note that those claims have been abandoned in Petitioners' Brief filed in this Court.

CONCLUSION

Petitioners complain that, to refuse to issue the writ in this case, will result in the curtailment of freedom of speech, press and assembly; that "the ghetto wall between white and black will rise higher, the perpetrators of discrimination in public recreational facilities will rejoice, the building of amity among the peoples of the United States will receive a severe set-back" (Pet. Brief, p. 38). Calm and dispassionate consideration of the facts will show that, if the convictions stand, the decision will have no effect one way or the other on the question of the legality of segregation of the races on public recreational facilities. Such a decision would merely constitute a finding that these Petitioners have not, in this case, properly presented an issue of infringement of some constitutional right; that only the violation of a law of the State of Maryland is involved. It could not possibly have the effect asserted by Petitioners. Whether *Plessy v. Ferguson, supra,* is still the law of the land could be questioned in a proper proceeding. In fact

it is being questioned at the present time in the case of *Boyer, et al. v. Garrett, et al., supra,* (Proceedings under Civil Rights Act, 8 U. S. C. A. sections 43 and 47).

On the other hand a decision favorable to Petitioners would at the most determine that the procedure adopted by the State of Maryland *in this case* abridged Petitioners' constitutional rights of freedom of speech, press and assembly. *It could not possibly determine the validity of the policy of the Park Board of Baltimore City concerning segregation of the Negro and white races on public tennis courts.*

It is respectfully submitted, therefore, first, that no federal question is presented in this case which this Court can consider and, second, that even if this Court could review the decision of the Court of Appeals of Maryland, the Petitioners were not in any way deprived of their rights of freedom of speech, press and assembly. The petition for the writ of certiorari should, therefore, be denied.

Respectfully submitted,

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